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Discriminated
[Protest Alleging Faulty and Discriminatory
Evaluation of Offers]

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-200482

DATE: April 15, 1981

MATTER OF: Photonics Technology, Inc.

DIGEST:

1. Where only available evidence that protester was misled by contract specialist during price discussions is conflicting statements from protester and contracting agency, protester has not met burden of affirmatively proving case.
2. GAO will not question contracting agency's evaluation of awardee's proposal shown to have reasonable basis.
3. GAO will not conduct investigation to establish whether protester's speculative statements are valid. Therefore, protester has failed to meet burden of proof where it fails to provide sufficient evidence that two military departments are acting in unison to help protester's competitor.
4. Since solicitation did not contain special evaluation factor giving preference to woman-owned concerns, it would have been improper to select protester for award on that basis.
5. Before procurement is set aside for small business concerns, contracting officer must have reasonable expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at reasonable price.

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6. Later-raised basis of protest is untimely and will not be considered on merits since protester should have been aware of ground for protest prior to closing date for receipt of initial proposals or at least at time contracting agency issued report.

Photonics Technology, Inc. (Photonics), [protests the award of a contract] to Norden Systems (Norden), a subsidiary of United Technologies, under request for quotations (RFQ) No. DAAK20-80-Q-0512 issued by the United States Army Electronics Research and Development Command (Army), Fort Monmouth, New Jersey.

The RFQ solicited quotations for a Manufacturing Methods and Technology (MM&T) project to establish production techniques for Military Plasma-Panel Displays (plasma-panels). [Photonics believes that the Army misled it during negotiations and that the Army's evaluation of the offers was faulty and discriminatory.] However, we find no basis to question the award made in this instance.

FACTS

The plasma-panels called for in the RFQ are relatively thin electronic glass panels which replace conventional cathode ray tubes. They are used, for example, with weapons or electronic surveillance systems which require screen displays for their operation.

In the past, the production of these plasma-panels has required a considerable amount of the work to be done by hand. This MM&T procurement was intended to make the production of the panels more automated as a means of supporting the Army's Industrial Preparedness Program. Thus, the RFQ required the successful contractor to devise and establish an automated pilot-production facility capable of producing plasma-panels of two specified sizes at a rate of at least 50 acceptable panels of each size per month. Such a facility would fulfill the purpose of an MM&T project which, according to Army Regulation (AR) 700-90, is to bridge

the gap between prototype production and full-scale production by applying new and/or more efficient manufacturing methods to techniques developed earlier under laboratory conditions.

Thirty-five firms requested a copy of the RFQ, but only [three firms submitted quotations] as follows:

<u>Offeror</u>	<u>Total Cost and Fee</u>
Norden	\$760,913
Texas Instruments	790,979
Photonics	977,943

[A technical evaluation was then conducted. The proposals of both Norden and Photonics were found to be acceptable with the Texas Instruments proposal being considered susceptible of being made acceptable.] In their written report, however, [the evaluators also acknowledged a preference for Norden due to several innovative features in that firm's technical approach.]

After negotiations, Texas Instruments' proposal was found acceptable. [The Army then conducted a cost analysis of all three firms.] Upon completion of this, price negotiations were conducted with each of the offerors. Best and final offers were then requested. The three firms submitted the following offers:

<u>Offeror</u>	<u>Total Cost and Fee</u>
Norden	\$674,000
Texas Instruments	757,704
Photonics	795,793

Section "D" of the solicitation, entitled "Evaluation Factors for Award," provides that [the award will be made based upon the best overall proposal taking into consideration three major factors: technical, cost, and management.] Thus, [since Norden received the highest

technical rating, offered the lowest cost, and presented an acceptable management proposal, it was found to offer the best overall proposal and, therefore, was awarded the contract.]

GROUND^{Amended}S FOR PROTEST

The grounds for [Phot^{Amended}onics' protest can be summarized as follows:

1. [During price negotiations, the Army in effect dictated Photonics' best and final offer by telling Photonics exactly which of its prices were acceptable, which were unacceptable prices, and how these unacceptable prices should be adjusted; this misled Photonics into offering a higher priced proposal than it otherwise would have;
2. The Army's evaluation of Norden's technical proposal is defective because that proposal deviates from the solicitation's requirements and Norden has also failed to demonstrate the technical reliability of its approach;
3. The award to Norden violates an agreement Photonics reached with the Department of Defense under which the Government agreed not to subsidize the construction of a plasma-panel facility for Norden; and
4. By failing to make the award to Photonics, the Army is discriminating against a woman-owned, small business contrary to well-established Federal procurement policy.]

BEST AND FINAL OFFER

According to Photonics, when the Army's contract specialist telephoned the firm regarding its best and final offer, the specialist went through Photonics' cost proposal item by item explaining which proposed

cost was acceptable and which was not. For those items found unacceptable, Photonics states that the specialist proposed lower figures to which he claimed the Army would agree. Photonics maintains that it was concerned that if it did not incorporate the exact figures the specialist proposed, its offer would be penalized--as mentioned in section "D" of the solicitation--for proposing costs which are unrealistically low. In addition, Photonics believed that the Army was revealing its negotiation position which if agreed to by Photonics would guarantee it the contract award. Except for these beliefs, Photonics claims that it would have submitted a best and final offer lower than the one Norden submitted. In Photonics' opinion, then, it was fatally misled by the Army.

[In response, the Army argues that the contract specialist never made the statements attributed to him by Photonics and never intended to dictate to Photonics what its best and final offer should be. According to the Army, the sole purpose for the telephone conversation in question was to conduct meaningful discussions with Photonics as required by Defense Acquisition Regulation (DAR) § 3-805.1 (1976 ed.). By these discussions, the Army argues that it only wished to provide Photonics with "a complete understanding of what was most advantageous to the Government's position." According to the Army, it did not intend to make some sort of counteroffer, as Photonics contends, and it further notes that nothing in Photonics' best and final offer indicates that it was the result of either Government direction or a counteroffer.

Meaningful discussions, either oral or written, are normally required in negotiated Federal procurements. In these discussions, the contracting agency must furnish the offerors information concerning the areas of deficiency in their proposals so that they have the opportunity to satisfy the solicitation requirements. However, the context and extent of discussions needed to satisfy the requirement for meaningful discussions are matters primarily for determination by the contracting agency whose

judgment will not be disturbed unless it is without a reasonable basis.} Okaw Industries, Inc., B-197306, September 29, 1980, 80-2 CPD 228; see also, DAR § 3-805.3 (1976 ed.).

In this connection, we note that {it is not improper for a contracting agency to inform an offeror of excesses in its proposal and advise the offeror to reduce proposed costs in certain areas and even delete certain items.} See Washington School of Psychiatry/The Metropolitan Educational Council for Staff Development, B-192756, March 14, 1979, 79-1 CPD 178.

Consequently, there was nothing improper with the contract specialist advising Photonics about certain cost items he believed needed to be revised. Such discussions were in fact required under the procurement regulations. The issue, then, is actually whether during the discussions the contract specialist intentionally or negligently misled Photonics to believe that its best and final offer would be acceptable only if it used the exact figures approved or recommended by the specialist.

As noted above, Photonics contends that the language used by the contract specialist left little doubt that Photonics was expected to adjust its best and final offer as suggested. The Army, on the other hand, denies both the general purpose Photonics attributes to the discussions and the specific language Photonics claims the contract specialist used.

The general rule is that {the protester has the burden of affirmatively proving its case.} Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. And {where, as here, the only available evidence is the conflicting statements of the protester and the contracting agency, we have held that the protester has failed to meet its burden of proof.} Del Rio Flying Service, Inc., B-197448, August 6, 1980, 80-2 CPD 92. Therefore, under the record presented, {we cannot conclude that Photonics was misled by the contract specialist during the negotiation process.}

NORDEN'S PROPOSAL

Photonics also argues that Norden's proposal deviates from the solicitation's requirements and that Norden has failed to demonstrate the technical reliability of its approach. More specifically, Photonics points out that the RFQ required the plasma-panels to be "direct replacements for the Owens-Illinois plasma-panels of the same size and picture-element count." The Owens-Illinois panels, according to Photonics, employ a "thick film" method in their manufacture--the same method Photonics uses. Norden, however, intends to use a "thin film" method. In Photonics' opinion, the reliability of thin film plasma-panels, in contrast with the reliability of thick film panels, has not been demonstrated. Photonics argues that "until hundreds of thin film panels have been manufactured and operated for thousands of hours, the reliability of the thin film panel will be a serious question." In light of this, Photonics maintains that Norden's panels do not satisfy the solicitation requirement of being "direct replacements" for the Owens-Illinois panels. Photonics believes that Norden's proposal "must be considered prima facie non-responsive" and that Norden's thin film panels cannot be considered qualified for an MM&T contract until there is an "absolute demonstration" of their reliability.

[We have held that it is not the function of our Office to evaluate proposals to determine which should have been selected for award. The determination of the relative merits of proposals is the responsibility of the procuring agency since it must bear the burden of any difficulties incurred by reason of a defective evaluation.] In light of this, [procuring officials enjoy a reasonable degree of discretion and such discretion will not be disturbed unless shown to be arbitrary or in violation of the procurement statutes and regulations.] Our Office, therefore, will not substitute its judgment for that of the procuring agency by making an independent determination. Pacific Consultants, Inc., B-198706, August 18, 1980, 80-2 CPD 129.

In view of the above-mentioned rule, we will not conduct an independent evaluation of the proposals to determine if we would have awarded the contract to Norden. Rather, we will review the Army's evaluation to determine whether it had a reasonable basis. Peter J.T. Nelson, B-194728, October 29, 1979, 79-2 CPD 302.

At the outset, we note that the concept of "responsiveness" is not applicable in negotiated procurements. TM Systems, Inc., 56 Comp. Gen. 300 (1977), 77-1 CPD 61. If an initial proposal is not in full accord with the solicitation requirements, it will not be rejected so long as it can reasonably be made acceptable through subsequent negotiations.

The Army preferred Norden's technical proposal not only because its thin film approach was sound and feasible, but also because it indicated several innovative features such as eliminating the need for gold in the production of the panels. Contrary to Photonics' apparent assertion, nothing in the solicitation prohibits the use of the thin film technique. Merely because these plasma-panels are intended to be "direct replacements" for the Owens-Illinois panels does not, in our opinion, mean that they have to be identical to those panels; rather, they need only be capable of performing in a similar manner. Thus, [we do not believe that the Army's evaluation was unreasonable simply because it did not reject Norden's proposal for employing a thin film technique. Moreover, the question of whether the thin film technique will prove reliable is a matter which falls within the discretion of the procuring officials.] Pacific Consultants, Inc., supra. This ground for protest, therefore, is essentially a disagreement between Photonics and the Army over the relative merits of using the thick film or the thin film method of producing plasma-panels. We have held in the past, and hold again here, that such a disagreement does not render a contracting agency's evaluation unreasonable or otherwise provide us a basis to question the evaluation. Peter J.T. Nelson, supra.

VIOLATION OF PRIOR AGREEMENT

In 1979, Photonics filed a protest with our Office against the award of a contract to Norden by the Department of the Navy, Naval Electronic Systems Command (Navy). The contract was for the Marine Integrated Fire and Air Support System (MIFASS) which would utilize large area plasma-panels. In its protest, Photonics complained that Norden had never successfully manufactured any plasma-panels and that the Federal Government would be financing Norden's manufacturing facility.

Upon learning the specifics of Photonics' protest, the Navy contracting officer sent Photonics a letter explaining the Navy's position. According to the contracting officer, all tooling and test equipment required for the contract would be provided at Norden's expense. Moreover, he informed Photonics that Norden would receive a firm, fixed price of only \$3,960 per panel which, in his opinion, would not cover Norden's actual costs. In conclusion, the contracting officer assured Photonics that the Government would not finance the building of a plasma-panel facility for Norden.

After receiving this letter, Photonics withdrew its protest indicating that its concern over the award to Norden had been eliminated.

In its present protest, Photonics charges that the "Government" has breached its "covenant" with Photonics. In Photonics' opinion, the letter from the Navy contracting officer created an agreement between the Federal Government and Photonics that the "Government," not just the Navy, would not finance the building of a plasma-panel facility by Norden. Thus, Photonics believes that the MIFASS contract and the present MM&T contract are closely related. By making the MM&T award to Norden, Photonics argues that the Federal Government (through the Army) is providing Norden the financing for a

plasma-panel facility it said (through a Navy spokesperson) that it would not provide. Therefore, Photonics sees the Army's MM&T contract as subsidizing Norden in breach of a Navy agreement which was binding on all Federal agencies.)

The Army, however, maintains that this ground for protest is without merit. It believes that the letter Photonics received from the Navy is not an agreement at all, but rather an explanation by the Navy of some matters Photonics raised in its initial protest. [The Army also argues that even if there was some sort of agreement between the Navy and Photonics, it would not be binding on the Army since the two departments perform their procurement functions independent of each other, as well as independent of all the other military departments under the Department of Defense.]

Finally, the Army notes that the MIFASS contract is a 3-year, \$40 million effort under which Norden is to supply only 19 plasma-panels at a price of \$3,960 per panel; the Army's MM&T contract, on the other hand, is a relatively small procurement with the goal of automating the manufacture of plasma-panels. [In the Army's opinion, there is no comparison between these two procurements--their scope and objectives are entirely different.] Therefore, the Army believes that it is impossible to claim that the MM&T contract was intended to somehow subsidize Norden's Navy contract.

[It is clear from the face of the Navy's letter to Photonics that it was not intended to be a "covenant" as Photonics claims, but rather an explanation of the Navy's position. Therefore, we do not believe that Photonics had a binding agreement with either the Navy specifically or the Federal Government in general.]

Nevertheless, Photonics did withdraw its protest against the MIFASS contract in reliance upon the information contained in the Navy letter. However, from the facts presented, there is no evidence that the Navy has acted inconsistently with its stated position. In its present protest, [Photonics only speculates that the Army and the Navy are acting in unison to help Norden

get into the plasma-panel business. } It does not show how or why these two departments are working together to reach this end, only that it suspects that funds from the MM&T contract will be used to perform the MIFASS contract.

As noted above, {the protester has the burden of affirmatively proving its case.} Reliable Maintenance Service, Inc.--request for reconsideration, supra. Moreover, {our Office will not conduct an investigation to establish whether a protester's speculative statements are valid.} Alan Scott Industries, B-197036, March 21, 1980, 80-1 CPD 212. Under the circumstances, {we do not believe that Photonics has carried its burden of proof on this issue.}

Photonics now believes that we should monitor the MIFASS contract to make sure that its suspicions are not realized. However, in view of the limited resources we have available for our audit function, {we decline to conduct an audit where, as here, the protester fails to furnish sufficient information to justify such a review.} See, e.g., Soft America, Inc., B-199852, January 30, 1981, 81-1 CPD 53.

DISCRIMINATION AGAINST WOMAN-OWNED,
SMALL BUSINESS

{Photonics argues that in making the award to Norden, the Army discriminated against a woman-owned, small business contrary to well-established Federal procurement policy.} In this connection, Photonics cites Executive Order No. 12138, 3 C.F.R. § 393 (1980), as requiring contracting agencies to take appropriate action to allow woman-owned business to participate in Federal procurement. Assuming that Photonics is a woman-owned concern and that the contracting agency can give special preference to such firms, {since the solicitation did not contain a special evaluation factor providing such preference, it would have been improper to select Photonics on that basis.} Phelps Protection Systems, Inc., B-181148, November 7, 1974, 74-2 CPD 244. {Therefore, we find no basis to question the fact that the Army gave Photonics no special preference for being a woman-owned business.}

As to whether the Army should have set this procurement aside for small business, we note that DAR § 1-706.5(a)(1) (1976 ed.) requires that before this is done the contracting officer must have a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at a reasonable price. Photonics has not alleged nor shown that the required competition existed here.)

In this case, the contracting officer decided that the procurement should be unrestricted and both the Small Business Advisory Office and the Small Business Administration Procurement Center representatives concurred. Under the circumstances, we have no basis to question the contracting officer's decision.)

Photronics protest, 2/13/80
UNTIMELY ISSUE

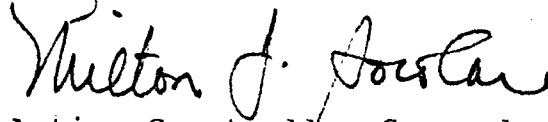
[In its final written comments to our Office, Photonics questions whether this procurement should have been an MM&T procurement at all since Norden claims to have a fully automated facility already built and ready for production. We believe that this issue is untimely raised and not for our consideration.]

Where, as here, a protester initially files a timely protest and later supplements it with a new and independent ground, we have held that this later-raised basis of protest must independently satisfy the timeliness criteria of our Bid Protest Procedures. James G. Biddle Company, B-196394, February 13, 1980, 80-1 CPD 129. Our Procedures require that protests based upon alleged improprieties in the solicitation which are apparent prior to the closing date for the receipt of initial proposals must be filed in our Office prior to that closing date.] 4 C.F.R. § 20.2(b)(1) (1980).

If Photonics believes that the solicitation should not have been an MM&T procurement, it should have protested this prior to the closing date for the receipt of proposals. If, on the other hand, Photonics

argues that it did not become aware of this ground of protest until after it had received the agency report and Norden's comments on the protest, its protest on this ground is still untimely. Under section 20.2(b)(2) of our Bid Protest Procedures, a protest of this type must be filed "not later than 10 days after the basis for protest is known or should have been known, whichever is earlier." 4 C.F.R. § 20.2(b)(2) (1980). Yet, Photonics did not raise this ground for protest until more than 2 months after the agency had issued its report and Norden had filed its initial comments on the protest. Thus, even giving Photonics the benefit of not being aware of this basis of protest until the agency report was issued, it is clearly untimely filed and not for consideration on the merits.

[Protest denied.]



Acting Comptroller General
of the United States